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No. 02-572

IN THE

# Supreme Court of the United States

INTEL CORPORATION,
*Petitioner*,

v.

ADVANCED MICRO DEVICES, INC.,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

## STATEMENT OF THE CASE

Advanced Micro Devices, Inc. ("AMD") designs and builds microprocessing chips for computers. It is the only competitor of any consequence to Intel Corporation ("Intel"), the dominant manufacturer of microprocessors worldwide. AMD believes that Intel has abused its dominant position through a variety of schemes and practices designed to suppress competition in microprocessor markets across the globe. In 2000, to secure AMD's right to compete against Intel "on the merits" in a market free from unlawful, anti-competitive practices, AMD filed the complaint with the European Commission ("EC" or "Commission") that underlies this discovery dispute.

The only marketwide remedy for anti-competitive conduct provided under EC law is a complaint to the Commission. Unlike administrative procedures in the United States, EC rules invest complaining parties with substantial rights of active participation in the EC's investigation of a charge and in subsequent proceedings: the complainant has the right to submit evidence, which the Commission is obliged by law to consider; the right to review the EC's evidence file and to respond to a preliminary decision to dismiss the complaint; and the right to appeal to the European courts any final decision by the Commission not to take action against the target.

Pursuant to that active, participatory role, when AMD became aware of documents in Intel's possession relevant to AMD's complaint, AMD advised Commission staff. The staff chose not to ask Intel to provide the documents, perhaps because it lacked the resources to conduct a review of them. Seeking to exercise its right to submit evidence to the Commission – and thereby to create and preserve the administrative record that would underlie a potential appeal – AMD sought discovery of a discrete preexisting collection of documents directly from Intel under 28 U.S.C. § 1782. In a

circumstance where delay alone could moot AMD's application, Intel has done everything in its power to erect barriers to disclosure of this evidence. The heart of Intel's opposition has been a series of arguments about the scope of permissible discovery under the statute. As the brief of the United States demonstrates, these arguments are at odds with the text and history of the statute.

The judgment of the court of appeals should be affirmed, and the case remanded for prompt entry of an appropriately tailored discovery order requiring Intel's immediate production of documents relevant to the ongoing EC proceeding on AMD's complaint.

**A. The Underlying Dispute**

AMD filed its complaint with the EC on October 23, 2000, alleging that Intel had engaged in anti-competitive behavior in violation of European Community competition laws. JA 46, *see* JA 55-56 (discussing AMD allegations). Pursuant to its standard procedure, the Commission opened a file on AMD's complaint and submitted written questions to Intel concerning AMD's allegations. JA 46. Consistent with the active, participatory role a complaining party plays in Commission proceedings, *see infra* at 13-15, the EC provided AMD a redacted copy of Intel's response and sought AMD's comments. JA 46. In the course of preparing its response, AMD became aware that Intel had previously produced documents in *Intergraph Corp. v. Intel Corp.*, No. CV 97-N-3023 (N.D. Ala.), which likely would have bearing on the allegations contained in AMD's EC complaint. JA 46. Many of the documents had been submitted to the Alabama federal court itself in summary judgment proceedings and thus should be subject to public inspection. According to an expert witness who had personally reviewed the documents, they relate to, *inter alia*, Intel's market power in the relevant microprocessor market, "actions taken by Intel to preserve and enhance its position in the market," and "the impact of the actions taken by Intel to preserve and enhance its market

position." JA 55. "Many of the documents produced by Intel in the *Intergraph* case are very pertinent to the issues raised by AMD in its complaint to the European Commission and would be of great assistance to the Commission in reaching a decision on AMD's claims." JA 56.

Under EC procedures, AMD has the right to submit evidence to the Commission in support of its complaint – evidence the Commission is legally obliged to consider. *See infra* at 13. AMD could not, however, immediately obtain and submit the *Intergraph* documents because of a confidentiality order entered in that case. AMD therefore filed an application for a judicial order of discovery under 28 U.S.C. § 1782, which authorizes a U.S. District Court to order the discovery of documents "for use in a proceeding in a foreign or international tribunal."

**B. Background of § 1782**

As the brief of the United States observes, the current version of § 1782 "is the product of congressional efforts, over the span of nearly 150 years, to provide means to assist foreign tribunals in obtaining evidence for use in their proceedings." U.S. Br. 3.

The process of enacting the modern version of § 1782 began in 1958, when Congress concluded that the "extensive increase in international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, has pointedly demonstrated the need and desirability for a comprehensive study of the extent to which international judicial assistance can be obtained." S. Rep. No. 85-2392, at 3 (1958). Congress created the Commission on International Rules of Judicial Procedure for the express purpose of recommending revisions to U.S. laws to improve "existing practices of judicial assistance and cooperation between the United States and foreign countries." Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743. Specifically,

Congress tasked the Commission with drafting laws that would reform the "procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Id.*

Short on funds, in 1960 the Commission obtained assistance in its statutory mission from Columbia Law School Project on International Procedure. *See* Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1015 (1965) ("*International Litigation*"); Hans Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1072 n.168 (1961). Columbia Law School Professor Hans Smit was both Director of the Project and Reporter to the Commission. Professor Smit has been described as the "dominant drafter" of the modern § 1782, *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989) (R.B. Ginsburg, J.), and as its "chief architect," *In re Application of Euromepa*, 51 F.3d 1095, 1099 (2d Cir. 1995).

Building on 25 years of U.S. experience with liberalized discovery, the Commission in 1963 recommended a slate of changes to the Federal Rules of Civil and Criminal Procedure and to the U.S. Code, including a wholesale revision of § 1782. *See Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88-88 (1963). Congress unanimously adopted the Commission's recommendations, with no amendments and no debate. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 997; *see* U.S. Br. 5. The Commission's explanatory notes were adopted almost verbatim as the Senate Report accompanying the legislation. S. Rep. No. 88-1580 (1964); *see* Smit, *International Litigation*, *supra*, at 1016 n.11.

The revised § 1782 reflected two closely related policies, according to its chief architect:

> First, they are designed to state the fundamental policy that [nation-]states should grant both passive and ac-

> tive assistance in this area with the greatest possible liberality. Second, they are designed to offer a model and an invitation to foreign states to follow the American example.

Hans Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 229 (1994) ("*Recent Developments*"). The idea, according to the Chairman of the Commission's Advisory Committee, was for § 1782 to serve as an "example of unilateral, nonreciprocal, internal legislation . . . which other countries may wish to follow." Philip W. Amram, *Public Law No. 88-619 of October 3, 1964 – New Developments in International Judicial Assistance in the United States of America*, 32 D.C. Bar J. 24, 33 (1965). Section 1782, he explained, "is a one-way street. It grants wide assistance to others, but *demands* nothing in return. It was deliberately drafted this way." Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 651 (1965). As the Senate Report put it, the purpose of § 1782 was to "clarif[y] and liberalize[] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States," S. Rep. No. 88-1580, at 7, with the expectation that "the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." *Id.* at 2.[1]

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[1] Drawing from this legislative background, lower courts have consistently described § 1782 as serving "twin aims": "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to other courts." *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992); *see In re Letter Rogatory from Justice Court*, 523 F.2d 562, 565 (6th Cir. 1975) ("The goal of the Commission was to revise the law in order to provide wide judicial assistance . . . on a wholly unilateral basis. . . . [T]he purpose behind the proposals was to prod other nations into following the lead of the United States in expanding procedures for the assistance of foreign litigants."); *accord In re Bayer AG*, 146 F.3d 188, 191-92 (3d Cir. 1998); Pet. App. 8a.

Congress was not acting altruistically. It recognized a steadily growing involvement of U.S. commerce in international intercourse, and it understood that the United States has a direct interest assisting U.S. companies doing international business in the fair and efficient resolution of foreign controversies. And Congress knew from twenty-five years of experience with discovery under the Federal Rules of Civil Procedure that the truth is most likely to be ascertained when facts are "disclosed to the fullest practicable extent" prior to trial. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); *see Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947) (pre-trial discovery system, which allows parties to "obtain the fullest possible knowledge of the issues and facts before trial," is "one of the most significant innovations of the Federal Rules of Civil Procedure"); *accord Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964).

The liberalizing revisions to § 1782 incorporated this general philosophy of discovery into the assistance provided to foreign tribunals in several ways, often reflecting a conscious and willful rejection of the positions now advanced by Intel.

1. *Congress Broadens Proceedings For Which Evidence May Be Sought*

The 1948 version of § 1782 authorized district courts to provide assistance for "any civil action pending in any court in a foreign country." In 1949, Congress amended the statute to replace "civil action" with the phrase "judicial proceeding." In the 1964 revision, Congress eliminated both "civil action" and "judicial," to authorize discovery of evidence simply "for use in a *proceeding* in a foreign or international *tribunal*." Congress made clear its purpose:

> The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings

> are pending before investigating magistrates in foreign countries. . . . In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings.

S. Rep. No. 88-1580, at 7-8. "The term 'tribunal,'" Professor Smit's "authoritative commentary" (U.S. Br. 19 n.10) explained, "embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Smit, *International Litigation*, *supra*, at 1026 n.71. Professor Smit's commentary provided only two examples of the kinds of foreign "tribunals" for whom the newly liberalized discovery assistance was intended, and they are striking, given the posture of the instant case:

> The increasing number and importance of international tribunals make this liberal provision of assistance in aid of litigation in international tribunals of great significance. New Section 1872 ensures that an important international court, such as the Court of Justice of the European Economic Community, and litigants before such a court can be given any reasonable assistance they may require. It further permits the rendition of proper aid in proceedings before the EEC Commission in which the Commission exercises quasi-judicial powers, including proceedings under Article 19 of Regulation 17.

*Id.* at 1027 n.73.

2. *Congress Deletes "Pending" Requirement Specifically To Facilitate Pre-Litigation Discovery*

The 1863, 1948 and 1949 predecessors to the 1964 revision had all authorized discovery only for civil actions or judicial proceedings "pending in any court in a foreign country." U.S. Br. App. 3a-4a. The 1964 revision deleted the word "pending," requiring only that the requested evidence be "for use" in a proceeding. As Professor Smit's contemporaneous commentary explained: "In the new version, the word 'pending' was eliminated to facilitate the gathering of evidence prior to the institution of litigation abroad." *Id.* at 1026-27 n.72. "The only limitation on the nature of the evidence is that it must be sought for use in a proceeding in a foreign or international tribunal. It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be sued in such a proceeding." *Id.* at 1026.[2] The Senate Report confirms Congress's intention to authorize discovery of evidence to be used during a pre-litigation investigation: discovery is authorized, the Report states, "whether the foreign or international proceeding *or investigation* is of a criminal, civil, administrative, or other nature." S. Rep. No. 88-1580, at 9 (emphasis added).

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[2] Professor Smit has more recently reiterated the point:

> The old version of § 1782 provided for assistance in a proceeding pending in a foreign court. This requirement was deliberately eliminated. It was regarded as undesirable to limit the availability of American assistance to cases already pending, since it was realized that such assistance might be needed before proceedings had been formally commenced in the foreign court. The drafters had particularly in mind the possibility that foreign officials and other persons might wish to obtain evidence in preparing a proceeding to be commenced. . . . The word 'pending' was therefore dropped, but the requirement that the evidence be sought for use in a foreign proceeding was retained.

Smit, *Recent Developments*, *supra*, at 231-32.

In 1996, Congress again reaffirmed the point, adding to the statute language making clear that a district court may order discovery of evidence for use in proceedings in foreign tribunals "including criminal investigations conducted before formal accusation." Nat'l Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1996). Inasmuch as the statute – everyone agrees – already authorized production for use in proceedings "pending before investigating magistrates," S. Rep. No. 88-1580, at 7; *see* Intel Br. 8, the added language merely confirms, by way of example, the already existing authority to obtain evidence during the investigatory stage of a proceeding, *see* U.S. Br. 17.

3. *Congress Grants Discovery Rights To More Than Just "Litigants"*

Although the title of § 1782 refers to assistance to "foreign and international tribunals and to litigants before such tribunals," the word "litigant" appears nowhere in the statute itself. Rather, the statute authorizes district courts to upon request "by a foreign or international tribunal or upon the application *of any interested person*." Again, Professor Smit contemporaneously conveyed the intention of the drafters: "The latter term ['interested person'] is intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance." Smit, *International Litigation*, *supra*, at 1027. The Senate Report confirms that "litigants" are merely "included among (and may be the most common example of) the 'interested persons' who may invoke section 1782," U.S. Br. 19: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, *such as* a person designated by or under a foreign law, *or* a party to the for-

eign or international litigation." S. Rep. No. 88-1580, at 8 (emphasis added).

4. *Congress Rejects Foreign Discoverability Requirement*

The new version of § 1782 enacted in 1964, while significantly liberalizing available discovery, still imposed several limitations on the scope of permissible discovery: (1) the party from whom discovery is sought must reside or be found within the jurisdiction of the district court; (2) the material sought must be for "use in a proceeding in a foreign or international tribunal," (3) the party seeking production must be either the tribunal itself or an "interested person" in the foreign proceeding, and (4) material cannot be produced "in violation of any legally applicable privilege." 28 U.S.C. § 1782. The text does *not*, however, include any requirement that the material sought be discoverable in the foreign jurisdiction. To the contrary, as Professor Smit explained at the time, the text affirmatively authorizes – and was intended by its drafters to authorize – discovery that is *not* commonly allowed in certain foreign jurisdictions:

> Under new Section 1782, the district court may order the taking of both testimony and statements. Under the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony. By specifically referring to statements, Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard.

Smit, *International Litigation*, *supra*, at 1026; *see also* Smit, *Recent Developments*, *supra*, at 235 n.93 ("The drafters were quite aware of the circumstance that civil law systems generally do not have American type pretrial discovery, and do not compel the production of documentary evidence. They nev-

ertheless provided for discovery and compulsory production of tangible evidence pursuant to the federal rules.").

Responding to some recent judicial decisions (i.e., those relied upon by Intel here) that have read a foreign discoverability requirement into § 1782 for policy reasons, Professor Smit has reported that "the drafters of § 1782 specifically intended no such [foreign discoverability] requirement to apply." Smit, *Recent Developments*, *supra*, at 235. The drafters "realized that recourse to § 1782 might enable a foreign court or litigant to obtain evidence in the United States, production of which could not be compelled under foreign law," but they regarded this not only as unproblematic, but even "desirable," for three reasons. *Id.* First, it would promote the "twin aims" of the statute (i.e., providing liberal discovery to foreign tribunals in hopes of encouraging them to provide equally liberal discovery in aid of U.S. litigation): by making available to foreign tribunals and statutory "interested persons" the broad discovery generally available in American litigation, "the United States would communicate to the world at large what it regarded as the proper example to emulate in extending international cooperation and, in the process, promote better understanding and acceptance of American discovery practices." *Id.*

Second, "the drafters realized that making the extension of American assistance dependent on foreign law would open a veritable Pandora's box," *viz.*, "an unduly expensive and time-consuming fight about foreign law," something "quite contrary to what was sought to be achieved." *Id.* Forcing an American district court to become familiar with "the subtleties of the applicable foreign system," solely for the "purpose of honoring a simple request for assistance," could not be reconciled with the liberalizing goals and unilateral operation of the statute. *Id.*

Finally, Professor Smit reports that the drafters believed that even where foreign jurisdictions do not allow discovery comparable to U.S. procedures, many such foreign jurisdic-

tion nevertheless still "would generally quite readily accept and welcome the assistance American courts might grant in providing them with relevant information." *Id.* Of particular importance here given the EC's legal obligation to accept and consider any evidence submitted by a complaining party, *see infra* at 13, § 1782's drafters recognized that even where a foreign jurisdiction does not allow compulsory discovery, it still "would be most unlikely to preclude any litigant from submitting to the court any materials the litigant might like to offer." *Id.* In the worst case, if the foreign jurisdiction truly regarded "extra" discovery allowed in the U.S. as contrary to the policies of the foreign jurisdiction, it could simply refuse to admit or consider such evidence, thereby rendering the additional discovery simply meaningless. *Id.* at 235-36 (describing view of drafters that "foreign courts could always rule upon the propriety of reliance on evidence obtained through the cooperation extended by American courts when it was presented to them").

In sum, "the drafters of § 1782 regarded it as both unnecessary and undesirable to let the propriety of discovery with the aid of an American court depend upon discoverability and admissibility under foreign law." *Id.* at 236.

**C. European Commission Procedures**

Articles 81 and 82 of the Treaty of Rome ("EC Treaty") prohibit certain types of anti-competitive conduct affecting trade between members of the European Community. JA 89. Article 85 of the Treaty vests responsibility for enforcement of Articles 81 and 82 exclusively in the European Commission, which executes that responsibility through its Directorate-General for Competition ("DG Competition"). EC investigations can begin sua sponte or upon receipt of a complaint from "any natural or legal person[] who claim[s] a legitimate interest" in the alleged misconduct. Council Regulation 17/62, art. 3(2)(b), 1959-1962 O.J. Spec. Ed. 87; *see* JA 49.

If a proceeding is initiated by a complaint, the complaining party has numerous rights of active participation in the proceeding that are largely unfamiliar in U.S. administrative tribunal proceedings. To start, a complainant before the EC has the legal *right* to submit evidence to the Commission in support of its complaint. EC Br. 8 n.5 (citing Council Regulation 17/62, art. 19(3), 1959-1962 O.J. Spec. Ed. 87). This right is vital, because the Commission, like most enforcement agencies, has limited resources. As the EC itself recognizes, its "enforcement activity . . . depend[s] on information supplied by operators and consumers in the market."[3] But European practice does not leave a complainant subject to the vagaries of the Commission's interest in information, but, instead, imposes on the Commission the *legal obligation* to examine and consider any evidence submitted by a complainant:

> [A]lthough the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by Article 3 of Regulation 17 and Article 6 of Regulation 99/63 [now Regulation 2842/98] oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such kind as to distort competition in the Common Market and affect trade between the member-States . . . .

Case T-24/90, *Automec Srl v. Commission*, 1992 E.C.R. II-2223, 5 C.M.L.R. 431, 478 (1992); *see* Notice on Complaints ¶ 53 ("the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by a complainant, in order to assess whether those issues indicate

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[3] Draft Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty ¶ 2 (available at www.europa.eu.int/comm./competition/antitrust/legislation) ("Notice on Complaints"). The Notice on Complaints is effective May 1, 2004.

conduct which is liable to infringe Articles 81 and 82"). Further, if the Commission preliminarily decides not to proceed on a complaint, it must provide the complainant a formal explanation of its reasons and allow the complainant to respond. *Automec*, 5 C.M.L.R. at 476-77; Notice on Complaints ¶ 56. To prepare its response, the complainant is entitled to access the Commission's file and review all documents (except business secrets) on which the Commission relied in reaching its decision. JA 50, 93-94; Notice on Complaints ¶ 70. "The purpose of that intermediate phase in the administrative procedure before the Commission is, in fact, to safeguard the rights of the complainant, to whom an unfavourable decision should not be addressed without first giving him the opportunity to submit observations on the grounds upon which the Commission intends to rely." Case C-282/95P, *Guerin Automobiles v. Commission*, 1997 E.C.R. I-1503, 5 C.M.L.R. 447, 481 (1997).

Once that intermediate stage is complete, the Commission must either reject the complaint or initiate an action against the object of the complaint. *Id.* If the Commission decides not to proceed, the complainant is entitled to initiate an action against the Commission in the Court of First Instance, seeking "annulment" of the Commission's decision to reject the complaint. *Id.*; JA 50, 62; *see* EC Br. 8 n.5 (complainant has "the right to seek judicial review of Commission decisions not proceed with investigation or action on its complaint," citing Case T-24/97, *Stork Amsterdam B.V. v. Commission*, 2000 E.C.R. 309, ¶¶ 51-53); U.S. Br. 8; Notice on Complaints ¶ 78. The Court of First Instance has plenary authority review all factual and legal conclusions reached by the Commission, but its review is limited to the factual record developed by the Commission and the complainant during the proceeding up to that stage. *See Micro Leader Business v. Commission*, 1999 E.C.R. II-3989 ¶ 27. In the action for annulment, the Community courts rely on evidence submitted by the complainant during the investigative stage to

determine "first, whether the Commission has carried out the examination of the complaint which it is required to do by evaluating with all the requisite care the factual and legal aspects adduced by the applicant in his complaint." *Automec Srl*, 5 C.M.L.R. at 478; *see, e.g.*, *Micro Leader*, *supra*, at ¶¶ 57-60 (annulling EC rejection of complaint).

If the Commission does decide to proceed, "the complainant is entitled to participate" in subsequent proceedings. *Guerin Automobiles*, 5 C.M.L.R. at 481; JA 50-51. DG Competition typically issues a "statement of objections" ("SO") to the target of the complaint that specifies DG Competition's views as to the nature of the alleged infringement of competition laws and "advises the target of its intention to recommend a decision finding that the target has violated the relevant competition laws." U.S. Br. 8; *see* EC Br. 7. "The complainant has the right to make a written response to the SO." JA 93 (Intel expert); *see* Reg. 2842/98, art. 7; Notice on Complaints ¶ 64.

Upon issuance of the SO, the target has "the right to a fair hearing," Notice on Complaints ¶ 59, before "an independent hearing officer," EC Br. 7, who must "ensure that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently," Reg. 2842/98, art. 10. The complainant may participate in that hearing where appropriate. Notice on Complaints ¶ 65. After the fair hearing, DG Competition then decides "whether to recommend [to the full Commission] a finding of infringement against the target." EC Br. 7. The Commission either "dismisses the complaint, or issues a decision finding infringement and issuing penalties as appropriate." *Id.* No matter which action the Commission takes – dismissal or a finding of infringement and the imposition of penalties – that action is again subject to judicial review." *Id.*; *see* U.S. Br. 9.

Although "neither DG Competition nor the Commission as a whole is ever engaged in adjudicating rights *as between*

*private parties*," EC Br. 7 (emphasis added), the EC acknowledges that does have "significant responsibilities that partake of an adjudicatory character," EC Pet. Br. 4, as "in the last stage of the proceeding," when its "investigative function blur[s] into decisionmaking," EC Br. 9. As shown above, these adjudicative functions include resolving the merits of alleged violations of Community competition law, determining the legal rights of a private party target in a fair hearing, and imposing legally enforceable penalties.

**D. Proceedings Below**

AMD filed its § 1782 application for discovery of documents that Intel had produced in the *Intergraph* litigation on October 1, 2001. AMD submitted evidence establishing that the documents would impeach positions that Intel has taken before the EC and support AMD's complaint that Intel abuses its dominant position. JA 45-47, 54-6. The district court denied AMD's application. It held that "[t]he case is in the initial stage of preliminary inquiry," and because that stage is not itself adjudicative, it is not a "proceeding" under § 1782. Pet. App. 14a-15a.

The Court of Appeals reversed. It began by noting the many ways in which § 1782's amendments "broadened the discretion of district courts to act on foreign assistance requests." Pet. App. 5a. Specifically, the court observed that "the language used by Congress in Section 1782 is broad and inclusive, including by way of example even criminal investigations prior to formal accusation." *Id.* The court also noted that Congress had deleted the word "pending" from the statute, and had chosen the expansive word "tribunal" so that § 1782 would "include bodies of a quasi-judicial or administrative nature as well as preliminary investigations leading to judicial proceedings." *Id.* at 5a & n.2 (internal quotation marks and citations omitted).

The court then held that because the Commission is "authorized to enforce the EC Treaty with written, binding deci-

sions, enforceable through fines and penalties" and because its "decisions are appealable to the Court of First Instance and then to the Court of Justice . . . the proceeding for which discovery is sought is, at a minimum, one leading to quasi-judicial proceedings." *Id.* at 6a. Because the Commission's investigation "will lead to" a judicial or quasi-judicial proceeding, discovery is permissible under § 1782. *Id.* The court of appeals also found "nothing in the plain language or the legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." *Id.* at 8a.

The court of appeals remanded the case to the district court to "proceed to consider AMD's request on the merits." *Id.* at 9a. While the petition for certiorari was pending, a magistrate judge issued a recommended order of discovery, tailoring the relief to include to only those *Intergraph* documents directly relevant to the EC proceedings. The district court has held further consideration of that recommendation in abeyance pending disposition of the threshold questions presented by Intel's petition for certiorari.

## SUMMARY OF ARGUMENT

I. AMD takes seriously the comity concerns advanced by the EC, but they do not justify denying AMD discovery under the terms of § 1782. Leniency Program documents are not at issue in this case, nor would they be at risk of disclosure in *any* § 1782 proceeding. Neither is there any risk that parties will amass pretexual filings with the EC simply to obtain discovery under § 1782, as 40 years of experience under § 1782 have demonstrated. Equally unfounded is Intel's contention that the EC and other tribunals would be "offended" by an order granting § 1782 discovery of documents that would not be discoverable in the foreign proceeding. The EC, in fact, affirmatively welcomes the submission of evidence by a complainant, even though it does not afford the complainant compulsory discovery rights.

II. The question whether § 1782 imposes a foreign discoverability requirement starts and ends with the statute's text, which includes no such requirement. Inquiry into the statute's history and purposes confirms the textual conclusion. The twin aims of the statute are to provide liberal U.S. discovery to those involved in foreign proceedings so as to encourage foreign jurisdictions to provide liberal discovery to those involved in American proceedings. Subjecting foreign tribunals and interested persons to a costly and time-consuming fight over the nuances of foreign law – a subject matter U.S. courts are not well-situated to address in any event – would undermine those aims. There is also direct evidence that the drafters of § 1782 specifically intended not to impose a foreign discoverability requirement on the statute. Intel's policy-based counter-arguments are meritless, irreconcilable with the statute, and directed at the wrong branch of government.

III. AMD's request in this case unambiguously seeks documents "for use" in a "proceeding" in a "tribunal." First, the documents AMD seeks will be used in the quasi-judicial and judicial proceedings that necessarily will result from the current stage of the EC's proceedings. Even assuming the current investigative stage is not yet a pending "proceeding," § 1782 does not require that a proceeding be "pending" before discovery may be ordered. Indeed, Congress consciously deleted the word "pending" from the statute in the 1964 revision, for the specific purpose of facilitating discovery prior to the initiation of litigation. Neither the text nor history of the statute supports Intel's theory that Congress meant to preserve, *sub silentio*, a "pending" requirement for civil cases alone. Second, the current EC proceeding is, in any event, itself a "proceeding" in a "tribunal" within the meaning of § 1782. Indeed, the contemporaneous historical record shows that § 1782's drafters specifically considered EC proceedings to be within the compass of the statute.

IV. AMD's discovery request should not be denied as a matter of discretion. This Court should not impose, as general rules governing the exercise of discretion, the very requirements Congress chose *not* to include in the statutory text, especially given Congress's repeatedly demonstrated ability to adjust the statute in response to perceived policy concerns. Nor does the presence of the EC as amicus support denial of discovery in this particular case. The EC does support aspects of Intel's untenable interpretation of the statute itself, but it makes no suggestion that, if the statute must be read as allowing the district court to order production to AMD, the court nevertheless should deny AMD the documents it seeks. The EC would be obliged to consider such evidence if AMD obtained and submitted it, and such evidence could be of significant value not only to the EC's investigation, but also to any subsequent judicial review of the EC's decision whether or not to act against Intel. To secure the benefits of such discovery, however, an order must be issued promptly, so that AMD's procedural right to support its EC complaint can be vindicated, and its substantive right to operate in a competitive marketplace can be protected.

## ARGUMENT

As the brief of the United States demonstrates, nothing in the text or history of § 1782 supports Intel's arguments that AMD's discovery request should be denied on the ground that § 1782 bars discovery unless the evidence sought would be both (1) discoverable in the foreign jurisdiction, and (2) for use in a tribunal proceeding that is already "pending." We reaffirm and elaborate that statutory analysis in Parts II and III below.

Before addressing the terms and history of the statute itself, however, we first address the comity issues raised both by Intel and by the European Commission as amicus curiae. The exact textual basis for their arguments differs, but that is secondary. The fundamental point is that no proper construction of § 1782 on *any* of the questions presented here

would raise a genuine issue of international comity. Accordingly, the comity concerns expressed by Intel and the EC should not undermine the straightforward statutory analysis set forth in Parts II and III. Neither should such concerns in any way affect the exercise of the district court's discretion to order discovery in this case, as we show in Part IV.

## I. SECTION 1782 DOES NO DISSERVICE TO THE COMITY OWED TO THE EUROPEAN COMMISSION

### A. Section 1782 Poses No Threat to the Commission's Leniency Program

Both in its brief in support of the petition and its brief on the merits, the EC expresses concern that treating the EC as a "tribunal" will imperil the Commission's Leniency Program. Indeed, this seems to be the Commission's principal institutional concern. With all respect to the Commission, holding that the EC is a "tribunal" for purposes of § 1782 will not portend disclosure of confidential EC filings.

It is important to be clear from the outset that this case does not involve any inquiry into any communication between Intel and the Commission, much less any communication under the Leniency Program. U.S. Br. 29 n.16; AMD Opp. Cert. 13. And even if there *were* a hypothetical possibility that, in some imagined future case, § 1782 might be used to seek access to Leniency documents, that would not justify distorting the statutory term "tribunal" to block the discovery of *any and all* documents that might be used to support a complaint made to the EC. On the contrary, the EC's legal obligation to receive and consider evidence submitted by the complainant, *see supra* at 13-15, implies a responsibility not to put unnecessary roadblocks in the way of a complainant's effort to seek the truth.

The Commission's fear is wholly unrealistic in any event. Section 1782 authorizes discovery only for "use" in a foreign proceeding. But if the documents sought are *already*

*in the possession* of the foreign tribunal, there would be no plausible basis for invoking § 1782 to obtain them. Leniency Program documents, of course, would already be in the possession of the EC. Accordingly, if the EC is held to be a "tribunal" under § 1782, there still would be no basis whatsoever under the statute for requesting Leniency Program documents, and thus no genuine risk that holding the EC to be a "tribunal" would expose such documents to disclosure.

Not only are Leniency Program documents by definition outside the ambit of § 1782, they are also privileged and therefore protected from discovery under the explicit terms of § 1782. *See* 28 U.S.C. § 1782(b). As the Commission itself has argued, Leniency documents "should benefit from the same protection granted to other law enforcement agencies under the 'law enforcement investigatory privilege.'" EC Pet. Br. 7. There is no basis for doubting the competency of the district courts to recognize and respect this Court's own judgment long ago that when wrongdoing is reported to a government agency, "such information, given by a private citizen, is a privileged and confidential communication . . . the disclosure of which cannot be compelled without the assent of the government." *In re Quarles*, 158 U.S. 532, 535-36 (1895); *see Arnstein v. United States*, 296 F. 946, 950-51 (D.C. Cir. 1924); *United States v. Deere & Co.*, 9 F.R.D. 523, 525 (D. Minn. 1949).[4]

### B. Section 1782 Poses No Threat of Pretextual Complaints

The EC also worries that if it is treated as a "tribunal," complaining parties could circumvent important EC prohibitions against giving complainants access to the confidential business secrets of their competitors. EC Br. 13-14. Again,

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[4] It bears emphasizing as well that § 1782 is among the *least* plausible ways that discovery requests might be made for Leniency documents. The privileged character of those documents protects the Commission's interest in *all* discovery proceedings in the United States.

there is nothing to suggest that this concern speaks to any fact in the present record. U.S. Br. 29 n.16.

What is more, the EC policy concerning business secrets has no application to discovery rights in the United States. The EC policy applies solely to release *by the Commission* of information obtained in the exercise of its investigative powers. *See* Council Regulation 17/62, art. 20, 1959-1962 O.J. Spec. Ed. 87; EC Br. 13-14. As noted earlier, there would be no need to invoke § 1782 as to information already in the EC's possession. On the other hand, there is no law or policy imposing an obligation on the Commission to refuse documents that a complainant has obtained through valid legal processes. The fact that the Commission would not be free to disclose a certain kind of document does not mean that the European authorities intend to dictate to other nations how they should deal with business secrets. Indeed, the Commission's regulations make clear that the policy and obligation of the EC is to decide cases on their merits and, to that end, to receive and consider all evidence bearing on the merits. *See supra* at 13-15.

Relatedly, the EC fears that if § 1782 creates the opportunity for such access, it would "provide[] a powerful incentive to file pretextual complaints at the Commission." EC Br. 14. This concern is also unfounded. In the 40 years § 1782 has been on the books, there has been not the slightest hint that *any* proceeding has been commenced in *any* jurisdiction for the improper purpose of obtaining access to confidential information through § 1782. Moreover, even if there were a disposition to use § 1782 as a subterfuge for obtaining confidential information, there would be no need to rely on a proceeding in the EC to accomplish that purpose. A case under the competition laws of any foreign jurisdiction would provide a basis for invoking § 1782 that even Intel could not dispute. This has not been done because courts have applied § 1782 with circumspection, and because all

tribunals have means to protect themselves from misuse of their processes.[5]

Moreover, the contention that the EC may be overworked from pretextual filing reflects a misunderstanding of U.S. procedure. It would be pointless to file pretextual lawsuits with the EC (or any other tribunal) to obtain access to "business secrets" through § 1782. U.S. courts have ample experience with the protection of trade secrets, and ample means of assuring that the discovery process cannot be used for competitive advantage.

In short, far from encouraging pretextual complaints, § 1782 helps complainants to pierce through pretextual defenses and provides the Commission with better evidence on which to decide when a complaint has merit.

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[5] The EC, for instance, may reject a frivolous complaint at the outset, if the complainant has not provided sufficient factual support or has no legitimate interest in the alleged wrongdoing, or if the complaint does not implicate Community interest. *See* Notice on Complaints ¶¶ 28, 40, 47. Lawyers representing complainants before the Commission, of course, also have a professional duty not to abuse the Commission's processes with pretextual filings.

In addition to EC practice and procedure, there are significant U.S. deterrents to the abuse of § 1782 that concerns the EC. Rule 11 of the Federal Rules of Civil Procedure, for example, would authorize monetary sanctions for § 1782 applications based on exactly the kind of frivolous, pretextual filings the EC describes. *See* Fed. R. Civ. P. 11. (Rule 11(d) provides that such sanctions do not apply to discovery-related papers not filed with the court or to motions filed under Rule 26 through 37, but it does not exclude § 1782 applications.) The "tort of abuse of process" (Chamber Br. 14) could be invoked as well. As the Chamber of Commerce acknowledges, Rule 11 and tort remedies work successfully to "ensure that the discovery process is not employed frivolously." Chamber Br. 14. In short, *all* of the procedures that exist in U.S. civil litigation, as well as those available in the foreign jurisdiction, operate in the context of § 1782 to restrain the potential for abusive, pretextual filings.

### C. Section 1782 Hazards No Threat of Offense To Foreign Sovereigns

In support of its separate argument that § 1782 should be interpreted to allow discovery only when the evidence sought would be discoverable in the foreign jurisdiction, Intel contends that "'foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws.'" Intel Br. 21 (quoting *In re Asta Medica S.A.*, 981 F.2d 1, 6 (1st Cir. 1992)). The EC's appearance as an amicus in this case might, at first glance, be taken as corroboration of that position. But as shown above, nothing in the record before this Court, the text of § 1782, or the history of its application, suggests any actual risk of the consequences cited by the EC. And in fact, the European Community, like the United States, favors disposition of complaints on the basis of the best evidence available: the EC relies heavily on evidence submitted by complainants, and is in fact required by law to accept and consider such evidence, even though the complainant cannot obtain such evidence though compulsory discovery in the EC proceeding itself. *See supra* at 13-15. Accordingly, once the EC's concerns about its Leniency Program and pretexual filings are laid to rest, the EC should take no offense at the submission of documents obtained through valid U.S. legal processes.

The fact that the EC does not give a complainant discovery rights, but does allow a complainant to submit evidence that must be considered by the EC, exemplifies the broader flaw in Intel's comity argument for a foreign discoverability requirement: it depends on the demonstrably false premise that the inability to obtain discovery in a foreign court *necessarily* "means that the foreign court objects to the inquiry." *Bayer*, 146 F.3d at 194. In truth, "there is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use." *Id.* Such offense cannot be presumed because "[i]n many of such situations it may signify merely the unavailability of an ap-

plicable procedure." *Id.*; *see* U.S. Br. 24. Recognizing those points, the drafters of § 1782 specifically believed that "although a foreign court might not compel production of the evidence in the manner employed by an American court, it might very well, and ordinarily would, readily accept and rely on the evidence obtained with the help of the American court." Smit, *Recent Developments*, *supra*, at 236; *see*, *e.g.*, *Bayer*, 146 F.3d at 194-95. That is *exactly* the situation here: even though the EC does not allow AMD to compel production of the documents at issue, the EC will readily accept and rely on them, if they are submitted. The EC's own regulations and European judicial decisions require no less.[6]

In sum, this case does not threaten disrespect for the EC. AMD, of course, is not engaged here in a disinterested crusade to improve international judicial procedure. It is a complainant urgently seeking relief to which it believes it is entitled under EC law. It would make no sense for AMD to press for discovery that would offend the tribunal to which it must be submitted. AMD informed the Commission staff before filing this matter; and it has kept the staff informed at every step of the process. AMD has repeatedly offered to dismiss this proceeding if the Commission finds it offensive

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[6] And even where the foreign tribunal would *not* "readily accept" evidence obtained under § 1782, the drafters understood that the tribunal could fully ensure that proper results were reached in its proceedings simply by precluding the admission of the "extra" evidence produced under § 1782. *See* Smit, *Recent Developments*, *supra*, at 235-36 (drafters regarded foreign discoverability requirement "unnecessary" because "foreign courts could always rule on the propriety of reliance obtained [under § 1782] when it was presented to them"); *see also Euromepa*, 51 F.3d at 1101 (explaining that a foreign tribunal "can simply refuse to consider any evidence that [a party] gathers by what might be – under [foreign] procedures – an unacceptable practice" and thus "can quite easily protect itself from the effects of any [§ 1782] discovery order . . . that inadvertently offend[s] [foreign] practice"). Section 1782 need not be rewritten judicially to protect foreign tribunals from evidence the tribunals themselves are fully capable of excluding or ignoring if they wish.

or unconstructive, but AMD has never been asked to withdraw its § 1782 application – no doubt because AMD's quest does not conflict with European law or policy. The EC has raised concerns that are legitimate in the abstract – AMD has no wish either to undermine the Leniency Program or to encourage a welter of pretextual filings with the Commission – but they have no application either to this case, or to any realistic § 1782 scenario. The EC's concerns can be easily met by limiting § 1782 discovery to discrete materials relevant to the proceedings and excluding production of Leniency Program and other privileged materials. For over 40 years district courts have exercised their discretion prudently and there is no reason to doubt that they will continue to do so.

## II. SECTION 1782 IMPOSES NO "FOREIGN DISCOVERABILITY" REQUIREMENT

"[I]mposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute." *Bayer*, 146 F.3d at 192. And no less here than in respect to other statutes, courts "are not free to read extra-statutory barriers to discovery into section 1782." *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993).

### A. The Text of § 1782 Includes No Foreign Discoverability Requirement

The text of § 1782 includes no hint that material may be produced only if it would be discoverable in the foreign proceeding for which it is sought. *See* U.S. Br. 21-22; *Bayer*, 146 F.3d at 192-93; *Gianoli Aldunate*, 3 F.3d at 58-59. The "statutory language is unambiguous in its requirements," and it "makes no reference whatsoever a requirement of discoverability under the laws of the foreign jurisdiction." *Gianoli Aldunate*, 3 F.3d at 58-59. "If Congress had intended to impose an additional element as restrictive as a requirement that the materials sought be discoverable in the foreign juris-

diction, it would have done so explicitly." *Bayer*, 146 F.3d at 193.[7]

Intel's only real *textual* argument for a foreign discoverability requirement is based the two sentences of § 1782 providing that a district court "may prescribe the practice and procedure [for discovery], which may be in whole or in part the practice and procedure of the foreign country or the international tribunal," and that if no specific procedure is prescribed, the Federal Rules of Civil Procedure govern. 28 U.S.C. § 1782(a).[8] According to Intel, these provisions establish that the material sought must be substantively discoverable under either the foreign jurisdiction's rules or under the Federal Rules of Civil Procedure. Intel Br. 24-25. But Intel simply misreads the statute: the sentences on which Intel relies plainly do not define the source of substantive rules for determining whether material is discoverable, but only the "practice and procedure" for taking whatever evidence is deemed to be discoverable. They do not speak at all to the question whether the material sought must be discoverable under either U.S. or foreign rules. *See* U.S. Br. 22

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[7] Section 1782's text also establishes affirmatively that it encompasses materials not discoverable in the foreign jurisdiction. Section 1782 specifically refers to discovery of witness "statements," even though "[u]nder the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony." Smit, *International Litigation*, *supra*, at 1026. "By specifically referring to statements, Section 1782 makes clear that a district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard." *Id.*

[8] Intel suggests two other ostensibly textual arguments for a foreign discoverability requirement, *viz.*, that the title's reference to "litigants" proves that actual litigants with discovery rights in a pending case may obtain discovery under § 1782, and that the example of "criminal investigations prior to formal accusation" added in 1996 proves the same point. Because these arguments actually relate only to Intel's theory that § 1782 establishes a *per se* bar to all "pre-litigation" discovery in all civil cases, we address them below in Part III, where we show that the statute decidedly does *not* limit § 1782 to "pending" cases in civil matters.

n.12 (sentences on which Intel relies "do not impose substantive restrictions on the discovery to be had, let alone create a *per se* foreign discoverability limitation").[9]

### B. The History And Purposes Of § 1782 Preclude A Foreign Discoverability Requirement

Although the history and purposes of § 1782 are largely beside the point given the unambiguous text, the statute's background confirms that Congress did not intend to impose a foreign discoverability requirement precondition to relief under § 1782. *See Gianoli Aldunate*, 3 F.3d at 59 ("a literal reading of the unambiguous language of section 1782 comports with the purposes and legislative history of the statute"). Indeed, "a liberal intent to provide judicial assistance whether or not reciprocity exists has been acknowledged as a primary statutory goal since section 1782's inception." *Bayer*, 146 F.3d at 192 (internal quotation marks omitted).

As discussed above, it is widely recognized that § 1782 was driven by "twin aims": providing liberal discovery to those involved in tribunal proceedings in foreign jurisdictions, so as to encourage foreign jurisdictions to provide American litigants equally liberal access to documents abroad. *See supra* at 4-5 & n.1. Congress understood that those aims would be disserved by a rule that allowed "a request for cooperation [to] turn into an unduly expensive and time-consuming fight about foreign law." Smit, *Recent Developments*, *supra*, at 235. As Judge Calabresi has explained, a foreign discoverability rule would require "specu-

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[9] The sentences were added to cure a problem with § 1782's predecessor, which required that depositions be taken in accordance with American civil rules, which in turn conflicted with some foreign deposition-taking rules. The provisions on which Intel relies were added simply to ensure that district courts have authority to prescribe procedures – deposition-taking procedures, in particular – as needed to facilitate particular foreign requests. *See* Smit, *International Litigation*, *supra*, at 1028. They have nothing to do with the substantive rules for determining the discoverability of the evidence being sought.

lative forays into legal territories unfamiliar to federal judges," marked by "battle-by-affidavit" litigation over the testimony of international legal experts, with district courts laboring to "glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law." *Euromepa*, 51 F.3d at 1099. Rather than open such a "Pandora's box" (*id.*) for every request for assistance from foreign tribunals and interested persons, Congress instead "authorize[d] discovery which, in some cases, would not be available in the foreign jurisdictions, as a means of improving assistance by our courts to participants in international litigation and encouraging foreign countries by example to provide similar means of assistance to our courts." *In re Order Permitting Metalgesellschaft AG to Take Discovery*, 121 F.3d 77, 80 (2d Cir. 1997). In short, "the drafters of § 1782 specifically intended no such [foreign discoverability] requirement to apply." Smit, *Recent Developments*, *supra*, at 229.[10]

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[10] Intel ignores the twin aims of the statute, and instead claims that the sole policy underlying § 1782 was to make the geographic location of a document irrelevant in international litigation. Intel Br. 24. Intel is wrong. Intel's theory is not based on any historical evidence of Congress's intent, but entirely on Intel's view that it would make "nonsense" of the statute if a party could obtain discovery of a document just because it is located in the United States rather than the foreign jurisdiction. *Id.* But the drafters did not think it would be "nonsense" at all if those involved in foreign litigation sometimes obtained more in the United States via § 1782 than they could abroad. To the exact contrary, as demonstrated above, such a result was specifically contemplated by the drafters, and was understood to be a direct result of the statute's *real* policy of providing broad discovery for use in proceedings foreign jurisdictions, to encourage those jurisdictions to provide broad discovery for American tribunals and parties. The drafters also believed that, as a general matter, foreign jurisdictions would welcome the introduction even of a non-discoverable document, and that if they did not welcome its admission they could simply exclude it, rendering the "extra" discovery not "nonsense," but simply ineffective in that instance. *See supra* at 12.

### C. Intel's Policy Arguments Are Meritless And Misdirected

Essentially conceding that a foreign discoverability requirement cannot be found in the plain text of § 1782, Intel concentrates its energy on policy arguments. But as just discussed, the historical record makes clear that there are but two basic policies that motivated the drafting and enactment of § 1782, and they are served, not undermined, by the unambiguous absence of any foreign discoverability requirement in the statute. Intel's separate policy arguments do not and could not compel a result different from that dictated by the actual text and purposes of the statute.

1. Intel first worries that allowing discovery unauthorized by foreign discovery rules would place U.S. litigants in a "detrimental" position vis-à-vis opponents in foreign litigation, because a foreign party could obtain more discovery in the United States under § 1782 than the U.S. party could obtain in the foreign jurisdiction. Intel Br. 20-21 (citing *Asta Medica*, 981 F.2d at 6). The Second and Third Circuits have squarely addressed and rejected this concern. *See Bayer*, 146 F.3d at 194; *Euromepa*, 51 F.3d at 1102; *see also* U.S. Br. 24 ("Concerns about maintaining parity among adversaries in litigation . . . do not provide a sound basis for a foreign discoverability rule.").

First, this objection has no force at all when evidence is sought from a non-party in the United States, as § 1782 allows. *See* Smit, *Recent Developments*, *supra*, at 237. It makes little sense to impose a categorical statutory prohibition on the basis of a policy concern that does not even apply categorically.

Second, the view that a § 1782 request automatically leads to one-sided "unlimited discovery" reflects a serious misunderstanding of the statute. Nobody disputes that § 1782 "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to

issue an order or may impose conditions it deems desirable." S. Rep. No. 88-1580, at 7; *see* Smit, *International Litigation*, *supra*, at 1029 ("In exercising its discretion, the court may not only refuse its assistance, but also may grant it upon such terms and conditions as it deems appropriate."). Forty years of experience demonstrate that district courts have never allowed §1782 applicants "unlimited discovery," and the record in this case confirms that there is no such issue here.

Experience thus demonstrates how easily "patent unfairness can be dealt with by the district court crafting an appropriate discovery order." *Bayer*, 146 F.3d at 194. For instance, if a foreign party seeks discovery under § 1782 from a U.S. litigant that the U.S. litigant could not obtain in the foreign party's home jurisdiction, the U.S. district court can simply "condition the assistance sought by the foreign party on [the foreign party's] making available to the American party [comparable discovery]." Smit, *Recent Developments*, *supra*, at 237; *see Euromepa*, 51 F.3d at 1102 ("if the district court wished to insure procedural parity . . . it could have conditioned relief upon the parties' reciprocal exchange of information"). Such a procedure is but one of many possible ways to avoid unfairness when a party seeks discovery under § 1782 that would not be allowed in the foreign jurisdiction. The point is that if there is any risk that a "blanket, 'American-style' grant of discovery to one side in a foreign lawsuit may confuse or skew th[e] litigation . . . it is far preferable for a district court to reconcile whatever misgivings it may have . . . by issuing a closely tailored discovery order rather than by simply denying relief outright." *Euromepa*, 51 F.3d at 1101.[11]

2. Intel also urges a distinction between requests made by foreign tribunals and those made by private persons: a

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[11] The magistrate judge in this case issued just this kind of tailored order, limiting AMD's discovery only to those documents likely to be most directly relevant to the EC proceedings.

foreign discoverability requirement may not exist when a request is made by a foreign tribunal, Intel acknowledges, but the requirement must exist when the request is made by a private party. Intel Br. 25. The problem, however, is that the requirement does not exist *anywhere* in the statute. Neither does any distinction between requests made by foreign tribunals and requests made by private "interested persons" – all are treated the same under § 1782's text.

But Intel is not deterred. It argues that when a foreign tribunal seeks discovery, the tribunal can be presumed to know what is discoverable in its own jurisdiction. Intel Br. 25. What this means, apparently, is that Congress would have thought it (a) unnecessary to state explicitly that a foreign discoverability requirement applies to requests from private parties (because the requirement so obviously would apply in that situation), and (b) unnecessary to state explicitly that the same foreign discoverability requirement does *not* apply to requests from foreign tribunal (because the requirement so obviously would not apply in that situation). The truth, of course, is that if Congress thought it important for a foreign discoverability requirement to exist *at all*, it would have written it into the statute; the *least* plausible scenario is that Congress would have relied on total statutory silence not only to establish such an important requirement, but also to create nuanced distinctions between private-party and foreign-tribunal requests. Yet that is exactly the scenario Intel imagines.[12]

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[12] Textual alchemy – creating something literally out of nothing – is not the only flaw in Intel's proposed distinction between requests from private parties and requests from tribunals. Intel forgets that many § 1782 requests come from foreign *officials* as "interested persons," who may be investigating serious criminal and civil offenses and may not *want* to be limited only to information they could discover in their own jurisdictions. Moreover, foreign prosecutors and civil investigators, no less than American prosecutors, may act more as advocates than as objective judges in describing what evidence is discoverable in their own jurisdictions. Either way, even if it made sense to read into the statute a

3. At the end of the day, Intel's – and even more clearly its amici's – arguments for reading a foreign discoverability requirement into § 1782, despite its total absence from the text, history and purposes of the statute, reduce to shop-worn complaints about the broad scope of discovery typically allowed under American civil rules. These arguments are misplaced for several reasons. First, the drafters of § 1782 were operating on the premise that discovery is *not* inherently evil, but in fact encourages accurate truthfinding by requiring up-front disclosure of all relevant facts. *See supra* at 6. Second, the international marketplace, and the inevitable disputes and litigation that arise out of that marketplace, have grown exponentially from the time forty years ago, when Congress thought the international economy was *already* important enough to ensure that American courts would provide liberal assistance to tribunals and others involved in international judicial and quasi-judicial proceedings. Third, district courts have the discretion to tailor discovery orders under § 1782 closely to the individual circumstances. Finally, objections to the fact that § 1782 does allow broader discovery where appropriate are not properly directed at the courts, but at the Congress that enacted the statute. It is particularly so here, inasmuch as Congress has repeatedly demonstrated its ability and willingness to revise § 1782 to meet changed circumstances. If the plain text of § 1782 now allows "too much" discovery, Congress can and

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conclusive presumption that foreign *tribunals* always assess with perfect accuracy the discoverability of evidence in their own jurisdictions, it makes no sense to apply that same presumption to foreign *officials*. Accordingly, under Intel's theory for why a foreign discoverability requirement should not be applied to foreign tribunals, such a requirement still should apply to foreign investigating officials. But hindering such investigators by imposing a costly and time-consuming foreign discoverability showing on them obviously would contravene the true comity purposes of the statute, demonstrating why Congress did not intend to impose any such requirement on *any* § 1782 applicant.

will revise that text. Until then, however, it is the obligation of the courts to apply the statute as Congress has written it.

## III. AMD'S § 1782 APPLICATION SEEKS DOCUMENTS "FOR USE" IN A "PROCEEDING" IN A "FOREIGN TRIBUNAL"

Intel also argues that AMD's document request is outside the scope of § 1782 because it does not seek documents for "use in a proceeding" in a "foreign tribunal." This is quite incorrect. Regardless whether the EC is a "tribunal" for all purposes of *European law*, the EC plainly *is* a "tribunal" for purposes of *§ 1782*, because its proceedings result in a final decision on the merits of a complaint, determining the legal rights of a party, and possibly imposing penalties. But even leaving aside the question whether the EC itself is a "tribunal" during the investigative stage of those proceedings, what cannot reasonably be disputed is that the EC's current investigation will *result* in a "proceeding" in a "tribunal" – either the EC will issue a Statement of Objections and proceed against Intel, or it will not, in which case AMD has the right to proceed against the EC in the European courts. Nothing more is needed to show that the evidence sought is for "use" in a "proceeding" in a "tribunal."

### A. AMD's Request Unambiguously Seeks Documents For Use In A "Proceeding" In A "Tribunal," Even If Such A Proceeding Is Not Currently "Pending"

The arguments of Intel and the EC that the Commission is not a "tribunal" *when it is investigating* miss a critical point: the EC *is* a "tribunal" when engages in the process of issuing a final decision against a party, and the European courts – to whom both Intel *and* AMD can appeal an EC decision going either way – are also "tribunals." Because AMD seeks documents for use in all these proceedings, AMD need not show that the current investigative stage of the proceeding is *itself* a "proceeding" in a "tribunal," as the decision below correctly recognized.

1. *The Current Investigative Stage Of The Proceeding Is Integrally Linked To Judicial Or Quasi-Judicial Hearings*

Regardless whether the current EC investigation is itself a proceeding in a tribunal, it will inevitably lead to a proceeding in a tribunal. As the court of appeals observed:

> A decision not to go forward [against Intel] would be appealable [by AMD] to the Court of First Instance, thus "leading to a judicial proceeding." A decision to proceed with a complaint would lead to hearings that are at least quasi-judicial in nature and then to an enforceable, judicially-reviewable decision.

Pet. App. 6a. Either way, "the investigation being conducted by [the EC's] Directorate is related to a quasi-judicial proceeding." *Id.* at 7a. None of this is in dispute. As the EC states: "No matter what action the Commission . . . takes on [DG Competition's] recommendation – whether it dismisses the complaint, or issues a decision finding infringement and imposing penalties as appropriate – that action is again subject to judicial review." EC Br. 7; *see supra* at 14-15. It is thus clear that no matter what course the EC's investigation takes, that investigation directly relates to a "proceeding" in a "tribunal." What the EC fails to recognize is that AMD seeks evidence "for use" in the inevitable judicial proceedings and at the only time when it is feasible under EC procedure to qualify such evidence for "use" in such proceeding.

As explained above, AMD has an express right to submit evidence to the EC in support of its complaint, and the EC has the legal obligation to consider such evidence in reaching its initial decision on whether or not to issue an SO. *See supra* at 13-15. Further, AMD is given the right to appeal a decision by the EC not to proceed, specifically for the purpose of allowing the European courts to ensure that the EC has fully investigated alleged wrongdoing and is adequately fulfilling its obligation to protect the European market from

barriers to competition. *Id.* Accordingly, regardless whether the EC itself is a tribunal at the current investigative stage of its proceedings, the evidence AMD seeks to submit is for "use" in a "proceeding" before a "foreign tribunal." But in that appeal the Court of First Instance can only consider evidence that was proffered to the Commission. If evidence is to be obtained under § 1782 "for use" in and by the European courts, in other words, it is *only* now, *before* the EC acts on the complaint, that such evidence may be obtained and submitted.

2. *Section 1782 Does Not Require That A Proceeding Be Currently "Pending"*

Intel's main response is that § 1782 does not authorize discovery for a "proceeding" that is not yet pending, even if such a proceeding is entirely inevitable. Pet. 13 ("Under the most natural reading, section 1782 authorizes civil discovery only if, among other things, a 'proceeding' is already underway before a foreign 'tribunal.'"); Intel Br. 27-33. This is wrong: the statutes that preceded § 1782 explicitly required that evidence be sought for use in "pending" judicial proceedings, and Congress intentionally deleted that requirement in the 1964 amendment.

a. Section 1782's predecessor statutes authorized district courts to order discovery of evidence for use specifically in "pending" suits or actions. *See* U.S. Br. App. 3a, 4a. The 1964 amendments deleted the word "pending" from the statute, and there is no evidence whatsoever that the deletion was inadvertent and thus inconsequential, as Intel suggests. Intel Br. 32-33. To the contrary, when "the legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute." *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1154 (11th Cir. 1988); *see Stone v. INS*, 514 U.S. 386, 397 (1995). The legislative history amply confirms that strong presumption here: as contemporaneously reported by the drafter of the statute,

"the word 'pending' was eliminated to facilitate the gathering of evidence prior to the institution of litigation abroad." Smit, *International Litigation*, *supra*, at 1026 n.72. "It is not necessary . . . for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding." *Id.* at 1026; *see Crown Prosecution*, 870 F.2d at 687 (R.B. Ginsburg, J.); *In re Letters Rogatory from Tokyo Dist.*, 539 F.2d 1216, 1218 (9th Cir. 1976) (joined by Kennedy, J.); *accord In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991); *Trinidad & Tobago*, 848 F.2d at 1155.[13]

b. This case illustrates the conundrum that would be created were § 1782 limited only to "pending" foreign cases. Commission rules give AMD the right to obtain and submit evidence in support of a complaint. But once DG Competition dismisses a complaint, judicial review of the decision is based on the record compiled by the EC, the complainant

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[13] Just as the statute includes no requirement that the proceeding be "pending," it includes no requirement that the proceeding be "imminent" in the sense that it will occur "very soon." *See United States v. Sealed I*, 235 F.3d 1200, 1205 (9th Cir. 2000) ("Focusing on the plain language of the statute, as we must, we note that the word 'imminent' does not appear. Surely, had Congress wanted to authorize assistance to foreign investigations only when foreign proceedings are imminent, it could have said so." (citation omitted)). The Second Circuit invented an "imminence" requirement out of whole cloth because the court was not sure "whether the deletion of 'pending' was intentional or inadvertent." *Brazil*, 936 F.2d at 705. The court agreed that it could not require that proceedings be pending, but it decided to impose a different – wholly nontextual – requirement of "imminence" on the statute, simply out of fear that "the deletion [of 'pending'] might have been inadvertent." *Id.* at 706. The court's "legislative accident" theory is indefensible, given that Congress is *presumed* to act intentionally when it deletes statutory language, *see supra* at 36, and given that there is unambiguous contemporaneous evidence that Congress *did* delete "pending" for the conscious purpose of facilitating discovery of evidence for use in proceedings that have not yet been instituted, *see supra* at 8.

and the target up to that point. If § 1782 is read as authorizing discovery only when a proceeding is "pending," and if the EC's current investigation is not such a "proceeding," then § 1782 discovery in support of an EC complaint becomes theoretically available only when it is too late for the evidence actually to be of use.[14] It is absurd to think that Congress wanted to preclude active participants in foreign tribunal investigations from obtaining evidence as part of a public investigation into wrongdoing, especially where – as here – the investigatory stage may be the only time such evidence could ever be obtained.

c. Intel nevertheless argues that the word "pending" must be read into the statute, because otherwise "there would be no logical stopping point to the speculative nature of the future 'proceeding' on which discovery does rest." Intel Br. 33. But again Intel simply ignores the text of the statute, which on its face limits discovery to evidence that is "for use" in a foreign proceeding. To show that evidence is actually "for use" in a foreign proceeding – and not merely to satisfy the applicant's curiosity – the applicant must show, as Justice Ginsburg has previously explained, that "the proceeding in the foreign tribunal and its contours [are] in *reasonable contemplation* when the request is made." *Crown Prosecution*, 870 F.2d at 687 (emphasis added). Phrased slightly differently, a court can be sure evidence is sought "for use" in a foreign tribunal proceeding when the court "satisf[ies] [itself] that a proceeding is very likely to occur." *Trinidad & Tobago*, 870 F.2d at 1156; *see also* U.S. Pet. Br. 17 (pending proceeding must be "integrally linked" to a judicial or quasi-judicial hearing). Thus, although a proceeding need not be "pending," under the statute "requests for infor-

[14] The same would be true even where the EC does proceed on a complaint. If the final, decisionmaking stage of its proceedings is the only point at which it becomes a "tribunal," then AMD – and the EC itself – could invoke § 1782 only when it is probably too late to provide assistance.

mation cannot be granted merely on the off chance or undocumented allegation that someday a judicial proceeding may follow." *Crown Prosecution*, 870 F.2d at 691 n.4.

Under the foregoing tests, this is an easy case. Certainly the actual pendency of a formal complaint to DG Comp is a "logical stopping point," because it is *only* during the investigative phase that the record can be made for judicial review. This is not a case of discovery aimed at a proceeding that may never be filed. There is a complaint on file, and the processing of that complaint is a necessary step in the process leading to a judicial or quasi-judicial proceeding. It is only when that complaint has been processed that the European courts can take cognizance of the evidence at issue. In authorizing discovery of materials for "use" in a foreign proceeding, Congress naturally intended to allow discovery at the time when such "use" would be possible.[15]

d. Contrary to Intel's submission, the reference to "litigants" in the *title* of § 1782 does not effectively substitute for the deleted word "pending" in the statute itself, limiting discovery only to "litigants" in "pending" proceedings. The title of a statute "cannot undo or limit that which the text makes plain." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947); *see Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[t]he title of a statute . . . cannot limit the plain meaning of the text") (internal quotation marks omitted). "For interpretive purposes, [the title is] of use only when [it] sheds light on some ambiguous word or phrase." *Yeskey*, 524 U.S. at 212 (internal quotation marks omitted). Here there is no "ambiguous

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[15] Reading the statute in accordance with its plain terms would hardly "open the statute to discovery requests in connection with virtually *every* administrative agency action . . . anywhere in the world," as the EC suggests. EC Br. 9. The EC points to no jurisdiction that affords a complainant such active, participatory rights in agency proceedings and subsequent judicial proceedings – the rights that ensure that the evidence AMD obtains will be "for use" in a "proceeding" in a "tribunal."

word or phrase" in the text; to the contrary, the statute includes numerous clear conditions on discoverability, and the pendency of a live proceeding is not among them. *See* U.S. Br. 19.[16]

The reference in the title to "litigants" on its face is merely a "short-hand reference" (*Trainmen*, 331 U.S. at 528) for the parties who may invoke § 1782, not substantive limitation on the scope of the statute. What the *actual statutory language* provides is that "any interested person" – and *not* just an actual "litigant" – may invoke the statute. As the United States explains, "[t]he words 'interested person' are broad and do not inherently require the applicant to be a 'litigant' in a traditional judicial forum. . . . As a textual matter, Congress could have, but did not, restrict discovery under Section 1782 to 'litigants' or 'parties.'" U.S. Pet. Br. 16. The legislative history confirms that Congress intended for "interested persons" to mean more than just "litigants": "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, *such as* a person designated by or under a foreign law, *or* a party to the foreign or international litigation." S. Rep. No. 88-1580, at 8 (emphasis added).[17]

There is no serious argument here that AMD is not an "interested person" within the meaning of § 1782. AMD is

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[16] Intel argues that, as a matter of policy, § 1782 discovery ought to be categorically limited to "litigants" in "pending" cases because, Intel says, only "litigants" have an "obligation to plead a case that satisfies any standard of legal sufficiency." Intel Br. 36; *see* Chamber Br. 14. In fact, there are numerous requirements both here and abroad that preclude complainants from seeking § 1782 discovery in the absence of a legally and factually adequate complaint. *See supra* note 5.

[17] By citing in the legislative history *examples* of "interested persons" *such as* a person designated under foreign law *or* a party, Congress obviously did not mean to declare that *only* such persons could qualify as "interested" under the statute. Intel Br. 26. Rather, the statements "indicate[] that a 'litigant' is only one of a variety of 'interested persons.'" U.S. Br. 19.

fully recognized by the EC as a "legal person[] who claim[s] a legitimate interest" in the proceeding under Article 82 of the EC Treaty. *See supra* at 12; *see also* Notice on Complaints ¶ 36 (parties "can claim legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests"). EC law and procedure give AMD the right to submit evidence in the proceeding, the right to access the EC's file and to submit comments and objections should the EC preliminarily decide not to proceed against Intel, the right to seek judicial review of a final decision not to proceed, and the right to participate in the proceedings should the EC go forward. *See supra* at 13-15. That active, participatory role is easily "sufficient to qualify [AMD] as an 'interested person' within any reasonable conception of the term." U.S. Br. 20.

3. *Section 1782 Does Not Include A Hidden "Pending" Requirement Applicable Only In Civil Cases*

Finally, Intel argues that even if a "proceeding" need not be "pending" in *all* cases, it must at least be pending in all *civil* cases. Discovery of evidence may be ordered at the investigative stage of a proceeding, Intel contends, *only* in criminal matters. This is a most extreme position. As Intel candidly acknowledges, on its theory of § 1782, no civil administrative body in the world – *including the EC itself* – could obtain discovery under § 1782 at the investigative stage of its proceedings. Intel Br. 32.

There is not a whisper of affirmative evidence that Congress sought such a result. To the contrary, the Senate Report specifically describes Congress's intention to authorize discovery "whether the foreign or international proceeding *or investigation* is of a criminal, *civil, administrative, or other nature*." S. Rep. No. 88-1580, at 9 (emphasis added). More generally, it would be manifestly at odds with the statute's broader purposes of encouraging liberal assistance for "foreign administrative tribunal[s]," *id.* at 8, and thereby en-

couraging similarly liberal assistance for American investigating entities. Pursuant to those aims, Congress would have expected courts to apply § 1782 so as to encourage foreign nations to provide prompt assistance to American agencies conducting civil investigations. Congress certainly would not have expected § 1782 to be thrown up as a roadblock to the requests of a foreign judicial body or quasi-judicial, administrative entity, merely because the entity is investigating only civil misconduct and not criminal wrongdoing.

Intel's view contradicts not only the recognized purpose of § 1782, but also its enactment history. The original 1855 statute apparently allowed discovery to aid a foreign criminal proceeding, but the next four versions explicitly limited discovery to pending foreign *civil* actions. *See* U.S. Br. App. 3a. The 1948 version authorized discovery for use in "[a]ny civil action pending in any court in a foreign country." *Id.* at 4a. One year later, Congress revised it to replace "civil action" with "judicial proceeding," thus implicitly opening the statute to discovery in pending foreign criminal cases for the first time since 1863. *Id.* Then in 1964 Congress amended the statute again, more substantially; among other things, Congress deleted the word "pending" and replaced the phrase "judicial proceeding" with a "proceeding in a . . . tribunal." Thus in relatively short order Congress transformed the very limited phrase "*civil* action *pending* in any *court* in a foreign country" into the broader "proceeding in a foreign or international tribunal." The statutory changes were striking and fundamental: the "civil" limitation was gone, the "pending" limitation was gone, the "court" limitation was gone. But as Intel reads the statute, *all three terms were left in*: if it is a "civil" proceeding, it must still be "pending" in a "court." Such a reading makes no sense in light of the changes Congress made between 1948 and 1964. By eliminating the terms "pending" and "civil" in particular, Congress made clear that there would be no distinction between

civil and criminal proceedings, and no distinction between pending and future proceedings.[18]

Contrary to Intel's suggestion, the amendment to § 1782 *in 1996* cannot establish that Congress intended *in 1964* to retain a "pending" requirement, applicable only to civil cases, without saying so in the statute. *See Haynes v. United States*, 390 U.S. 85, 87-88 n.4 (1968) ("The views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress."). Nor does the 1996 amendment independently create such a requirement. That amendment added illustrative language providing that discovery may be ordered "for use in a proceeding in a foreign or international tribunal, *including criminal investigations conducted before formal accusation*." 28 U.S.C. § 1782(a) (emphasis added). Intel mistakenly reads this language as specifying the sole instance in which pre-litigation discovery is allowed. But the word "including" obviously is not a *limiting* term; rather it is used to introduce an *example* of what the statute covers. *See Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (interpreting

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[18] Intel's contention that § 1782 imposes a "pending" requirement in civil cases would also place § 1782 into conflict with the United States' obligations under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Convention sets forth the rights and duties of its signatories with respect to letters rogatory, and is set forth as a Note to § 1782's immediate neighbor, 28 U.S.C. § 1781. In Article One of the Convention, the United States (along with other signatory nations) agrees to accept letters rogatory in "civil or commercial matters," through which a judicial authority of another signatory nation may seek to "obtain evidence" for the use of the judicial authority. Such a letter, however, "shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or *contemplated*." In other words, letters rogatory *may* seek discovery of evidence for use in a "contemplated" "judicial proceeding," "civil or commercial." But if Intel's theory of § 1782 is correct, the district court categorically *cannot* order discovery in response to such a letter if it seeks evidence in a "civil matter" for use in a "judicial proceeding" that is only "contemplated," even though the Convention plainly authorizes such requests.

statutory list following word "including" as merely "illustrative"); *West v. Gibson*, 527 U.S. 212, 217 (1999) ("the preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) (to attribute restrictive meaning to "the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application"; "The word 'including' does not lend itself to such destructive significance."). Thus, as the United States explains, on its face the language Intel cites simply provides "an *example* of what is covered by discovery 'for use in' a proceeding in a foreign tribunal; it is *not*" – as Intel contends – "an exception to a general rule that the proceeding in the foreign tribunal must be underway." U.S. Pet. Br. 17 n.6 (emphasis added); *see* U.S. Br. 17.[19]

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[19] Intel also briefly refers to an entirely different statutory provision, 15 U.S.C. § 6203(a), in its effort to locate a "pending" requirement in § 1782 applicable only to civil cases. Intel Br. 32. Intel believes that reading § 1782 as authorizing foreign tribunals to obtain investigation-stage discovery would create a conflict with § 6203(a). But Intel simply misreads § 6203(a). That provision authorizes district courts to grant discovery to the U.S. Attorney General, if the Attorney General agrees to open a parallel antitrust investigation pursuant to a mutual assistance agreement. But if the foreign antitrust authority does not seek a parallel investigation or if Attorney General does not wish to open one, nothing in the text or policy of § 6203(a) precludes a foreign antitrust investigating official from seeking investigation-stage evidence directly under § 1782. There are several reasons a foreign authority might rather seek the investigative assistance of the Attorney General: American authorities may be more effective in obtaining evidence from American courts under § 6203(a), or American authorities may object to a wholly-independent foreign investigation into American persons or entities operating on American soil. A foreign antitrust investigating authority is, in theory, free to ignore those virtues and proceed directly under § 1782(a), but doing so may not be as effective and may risk future cooperation. The point, however, is that the text and policies of §§ 1782 and 6903(a) are easily harmonized.

**B. There Is A Pending "Proceeding" In A "Tribunal" In Any Event**

Although this Court need not decide the question whether the pending investigation is a "proceeding" in a "tribunal" to affirm AMD's right to discovery under the statute, the answer to that question is clear: the pending investigation *is* a "proceeding" in a "tribunal" within the meaning of the statute – in fact, the EC is *the archetypal* "tribunal" under the statute.

1. Section 1782's predecessor statutes had all limited discovery to use in foreign "courts." U.S. Br. App. 3a-4a.. In the 1964 revision, the term was changed to "tribunal" explicitly "to make it clear that assistance is not confined to proceedings before conventional courts." S. Rep. No. 88-1580, at 7. The term "tribunal" was employed to encompass "administrative and quasi-judicial proceedings," *id.*, and the drafters referred at the time *specifically* to the EC's Article 19, Regulation 17 proceeding – the EC proceeding for which AMD seeks use of the requested evidence – as *the* example of the kind of quasi-judicial proceeding to which the new § 1782 would apply: "New Section 1782 . . . permits the rendition of proper aid in proceedings before the EEC Commission in which the Commission exercises quasi-judicial powers, including proceedings under Article 19 of Regulation 17." Smit, *International Litigation*, *supra*, at 1027 n.73.

2. The EC's brief does not acknowledge the clear intent behind § 1782, but instead relies primarily on European authorities establishing that the EC does not adjudicate rights *between private parties*. EC Br. 7. This is beside the point: because "the Commission, like criminal and civil courts and other administrative agencies, can adjudicate disputes between the government and private parties," it "exercise[s] adjudicative functions and accordingly fall[s] within the reach of Section 1782." U.S. Br. 16. The EC does acknowledge that it engages in a decisionmaking function "in the last stage of the proceeding," but denies that this could render

that proceeding a "proceeding" in a "tribunal" under § 1782. EC Br. 9. But the EC's assertion is pure *ipse dixit* – it offers no reason or precedent under § 1782 suggesting that an agency that adjudicates the legal rights of a private party cannot be a "tribunal" under § 1782 simply because it investigates allegations before deciding their merits.[20] Nor is there a basis in precedent, practice or theory under § 1782 for distinguishing the investigative stage of a "proceeding" from a final decisionmaking stage.[21] As the EC describes its own proceeding, the "stages" are not distinct, but "blur" together (EC Br. 9), as the EC gathers evidence and builds a case against the target of the complaint, which is ultimately presented during the "last stage." To say that a foreign administrative agency is not a "tribunal" until it reaches some such last "stage" in its proceeding would be to bar such an agency from obtaining evidence under § 1782 until it reaches that stage – a point at which it may be too late for the agency to gather new evidence. Nothing in § 1782 suggests that Congress wanted to bar foreign administrative entities from using § 1782 to investigate the facts prior to initiating a case; as discussed, the exact opposite is true.

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[20] The EC's reasoning would mean that an entity like a grand jury is not a "tribunal," which contradicts both common sense and the specific intention of the drafters that § 1782 encompass proceedings before a *juge d'instruction*, the rough equivalent of a grand jury. Chamber Br. 5.

[21] The EC suggests that it is not a "tribunal" for purposes of *European law*, namely Article 6 of the European Convention on Human Rights ("ECHR"), which ensures defendants a hearing before an "independent and impartial tribunal." Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, art. 6. But the Commission's status under the ECHR says nothing about its status under *§ 1782*, a law enacted decades earlier by a different sovereign to serve entirely different purposes. Indeed, the European Court of Human Rights has held that the Belgian Cour de Cassation – the Belgian Supreme Court – does not satisfy ECHR Article 6, *see Coëme v. Belgium*, Nos. 32492/96, 32547/96, 32548/96, 33209/96 & 33210/96, E.C.H.R. 2000-VII, but presumably nobody would argue that the Cour de Cassation is not a "tribunal" under § 1782.

3. Finally, it bears emphasis that the EC's arguments, if accepted, would preclude not just the EC itself, but virtually any other foreign administrative agency in the world from obtaining evidence during a "pre-litigation" investigative stage. This Court cannot be assured that the EC speaks for all other foreign administrative agencies in seeking severe categorical limitations on foreign access to the valuable investigative resource promised by the plain text of § 1782(a). *See* U.S. Br. 30. This is yet another reason that, if the policy and comity concerns advanced by Intel and the EC *do* warrant some revision to the text of § 1782, that is a task that must be entrusted to Congress and the President.

## IV. DISCOVERY SHOULD NOT BE DENIED AS A MATTER OF DISCRETION

For the reasons stated, § 1782 authorizes the district court to order the discovery AMD seeks. The final question is whether the arguments advanced by Intel and its amici justify denial of AMD's request as a matter of discretion, either through the imposition of general rules of judicial practice or by the individual exercise of discretion in this case. The answer on both counts is no.

*First*, it would makes no sense for this Court to impose, as general rules of practice, the selfsame foreign discoverability and pending proceeding requirements that Congress chose not to impose in the statute itself. The text of § 1782 reflects considered policy judgments by Congress, which has proven itself more than capable of revising § 1782 in response to perceived policy needs. Congress enacted the original predecessor to § 1782 in 1855, and revised the law in 1863, 1877 (with two statutes), 1948, 1949, 1964 and in 1996. *See* U.S. Br. App. 2a-5a. The Court should be all the more reluctant to revise Congress's work by imposing nontextual conditions on discovery here, given the foundations of § 1782 in the affairs of nations, as to which this Court typically defers strongly to the policy judgments of Congress. *See Haig v. Agee*, 453 U.S. 280, 292 (1981); *Zemel v.*

*Rusk*, 381 U.S. 1, 17 (1965); *Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 112 (1948).[22] *See also* U.S. Br. 29 (listing "compelling reasons why this Court should decline" to state in this case "general rules to channel the district court's discretion").

*Second*, the comity concerns advanced by the EC do not justify denying AMD discovery in this particular case. The EC's brief addresses only the general scope of § 1782. Nowhere does the EC argue, or even suggest, that if § 1782 does apply in these circumstances, AMD should be denied discovery so that it cannot submit the *Intergraph* documents for the EC's consideration. Nor could the EC be read as even implying such a position, for it would be very much contrary to the EC's own obligations under European Community law and procedure. As discussed above, AMD has the legal right under EC procedures to submit whatever evidence it believes will assist the Commission, and the EC is required to consider such evidence during its investigation of AMD's complaint. *See supra* at 13-15. Notably, nowhere in its merits filing does the EC suggest that it will not use the requested evidence if submitted by AMD. The EC's arguments before this Court, in other words, do not suggest that, if AMD *does* have a right to seek discovery under the terms § 1782, the EC would object to AMD's submission of the Intel documents that are the subject of this application.[23]

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[22] By contrast, the "supervisory power" principle Intel seeks to invoke relates solely to "procedural rules *governing the management of litigation*." *Thomas v. Arn*, 474 U.S. 140, 146-47 (1985) (emphasis added). Section 1782 is not primarily a civil rule of evidence or procedure governing ongoing American litigation practice – as evidenced by the fact that the statute explicitly authorizes district courts to grant discovery in accordance with procedures *other* than those prescribed by the American civil rules. Section 1782 is not about *American* litigation; it is about providing discovery assistance for *foreign* proceedings.

[23] Thus, Professor Smit's comment that "an American court may properly take into account a foreign or international tribunal's ruling that the evidence sought should not be produced," Hans Smit, *American As-*

Indeed, if there were reason to think that the EC objected to AMD's specific request (as opposed to the language of the statute itself), that would only militate *in favor* of granting the request. As elaborated above, one of the main reasons European law allows a complainant such as AMD to participate in Commission proceedings is to help create a factual record so that the courts can tell whether the Commission has fulfilled its duty to protect the public from anti-competitive behavior. AMD's right to file an action in the Court of First Instance against the EC in turn enables Community courts to fulfill their own responsibility to oversee the EC. If the EC were read as signaling that it will not consider relevant evidence a party seeks to submit, it is all the *more* imperative that the record be completed so that the EC's decision can be properly reviewed by the Community courts. In that circumstance the evidence will be "used" by the courts, who would not necessarily share what has (incorrectly) been taken to be the EC's desire to preclude submission of evidence of Intel wrongdoing. In short, the more it appears that the EC will seek to block or ignore such evidence, the more valuable that evidence would be to the Community courts overseeing the EC, and thus the more important it would be to grant AMD's discovery request.

The situation is, in fact, already urgent. AMD's EC complaint has been pending for over three years. Its § 1782 request has been pending for more than two. The passage of time creates an increasingly pressing need for AMD to obtain the documents and submit them to the EC, because if DG Competition dismisses AMD's complaint, subsequent judicial proceedings will be based only on the record com-

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*sistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 13 (1998), has no application here: the EC has argued only that it is not a "tribunal" under § 1782; it has not (and could not have given its legal obligations) "ruled" that the particular evidence AMD seeks should not be produced for submission to the EC.

piled before the EC by the time of that action. Accordingly, if the EC dismisses the complaint without considering the *Intergraph* documents, neither AMD nor the courts will have the "use" of those documents in reviewing the EC's action. The district court must be allowed to exercise its discretion to order production as expeditiously as possible – discretion that should not be constrained by broadly stated EC policy concerns that do not even purport to question AMD's right under EC procedures to obtain and submit evidence in support of its complaint.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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